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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,

Petitioners,

v.

BOWMAN TRANSPORTATION COMPANY, INC., et al.,

Respondents.

REPLY BRIEF FOR PETITIONERS

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1.

No party or amicus curiae defends in this court the Fifth Circuit's holding that § 703(h) of Title VII[1] prohibits the award of retroactive seniority. Respondent United Steelworkers of America (USWA) urges that the holding below was incorrect and that Petitioners are entitled to the relief they seek.[2] The government also urges reversal of the Fifth Circuit's holding.[3] Respondent Bowman admits that the Court of Appeals' reasoning is untenable and that retroactive seniority may sometimes be awarded; however, it seeks affirmance of the result on a ground entirely different

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[1] 42 U.S.C. § 2000e-2(h).

[2] USWA brief at 6, 9-10, 28-29. As collective bargaining representatives of the white employees whose seniority standing would be affected by the relief sought, USWA's concession that the Fifth Circuit erred carries particular weight.

[3] Government brief at 14-17.

from any considered below.[4] Although the briefs offer slightly different interpretations of § 703(h) and its legislative history, none of these interpretations would sustain the ruling below.[5] On the only question concerning the application of § 703(h) which is before the Court, all the parties agree: the Fifth Circuit's ruling that § 703(h) prohibits any award of retroactive seniority is erroneous.[6]

The remedial scheme of Title VII, which centers on § 706(g),[7] is a comprehensive one reflecting a national commitment of highest priority. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d 280, 297 (1975). Remedial limitations should, therefore, be found only where clearly intended by Congress or required by policy.[8]

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[4] Co. brief at 6, 12-13; see part 2, *infra*, pp. 5-6.

[5] Even the Fifth Circuit has recently indicated uncertainty as to whether *Franks* was correctly decided. See, *e.g.*, *United States* v. *T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 317 n.33 (5th Cir. 1975).

[6] The Union and Bowman argue that § 703(h) precludes seniority relief designed to remedy the continuing effects of discriminatory refusals to hire which occurred prior to the effective date of the Act (July 2, 1965). USWA brief at 29, n.33a; Bowman brief at 6, 13; see Government brief at 18. While this Court need not reach this question in this case there is persuasive authority that the legislative history does not preclude such relief (see *infra* at pp. 3-5), and that in fact Title VII requires a remedy designed to terminate as quickly as possible all continuing adverse effects of prior discrimination. Petitioners' brief at 29, n.41, 35-37; Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1556 (1975).

[7] 42 U.S.C. § 2000e-5(g).

[8] Elsewhere the Fifth Circuit has observed, "Title VII is strong judicial medicine and we refuse to vitiate its potency by glossing it with judicial limitations unwarranted by the strong remedial spirit of the act." (Footnote omitted) *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1377 (5th Cir. 1974).

In the absence of any precise definition of the key term of § 703(h), "bona fide seniority or merit system," in the section's text or legislative history,[9] no applicable remedial limitation should be found here. Generalities about "preferential treatment" and "rightful place"[10] are not conclusive; the crucial fact is the lack of evidence that Congress addressed any specific seniority issues, such as retroactive seniority relief, in adopting § 703(h). Nothing in the legislative history shows that the Clark-Case materials[11] reflect any *specific* Congressional intention as to seniority.[12] Moreover, those materials say nothing pertinent to this case about the legality of Bowman's seniority system.[13]

Respondents' reliance on *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), as precedent for finding implied remedial restrictions in a provision that defines unlawful conduct is

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[9] See Petitioners' brief at 20-21, 24-31.

[10] *Cf.* USWA brief at 9-12, 20-21.

[11] The Clark-Case Interpretative Memorandum, 110 Cong. Rec. 7212-15 (1964); Interpretative Memorandum prepared by Department of Justice, 110 Cong. Rec. 7206-07 (1964); answers prepared by Sen. Clark to questions presented by Sen. Dirksen, 110 Cong. Rec. 7215-17 (1964). See Petitioners' brief at pp. 25-26, nn. 34-36.

[12] *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972), which USWA cites for the proposition that a Congressional sponsor's interpretation must be controlling, is inapposite here. This Court in *Pipefitters* adopted Sen. Taft's statements construing § 304 of the Taft-Hartley Act because (1) he was explicating provisions already before the Senate in the form finally adopted; (2) their meaning was unambiguous; (3) that meaning was in full accord with the statutory scheme; and (4) Sen. Taft's statements were made in floor colloquy with colleagues who sought specific reassurance as to the scope of the limiting effect of § 304. The Clark-Case materials lack these indicia of an authoritative construction.

[13] The Clark-Case materials do not even address the issues raised by seniority systems, like Bowman's, which freeze the effects of post-Title VII hiring discrimination. Here, black workers are "low man on the totem pole," *cf.* 110 Cong. Rec. 7207, precisely because of their race and Bowman's past policy of racial exclusion.

unpersuasive. The definitional provision involved there[14] was not, as is § 703(h), vague or subject to divergent interpretations; it states quite clearly what Congress intended the NLRB *not* to order.[15] This Court merely held in *H. K. Porter Co.* that in the face of unambiguous language establishing that employers were not to be compelled by the statutory scheme to accept particular terms, the general remedial provision of the Act[16] should not be read to allow the Board to compel such acceptance, 397 U.S. at 107-08. But § 703(h) and its legislative history, in contrast, do not clearly indicate what the Congressional policy is with respect to particular seniority issues under Title VII.

Rather than adopting any vague generalities incorporating prohibitions on full seniority relief, the courts should look to § 703(h) as the starting point for an equitable analysis in light of the remedial purpose of Title VII and the broad scope of § 706(g).[17] See Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1551-57 (1975). That analysis would, in each case, carefully weigh

[14] Section 8(d) of the Labor Management Relations Act (1947), 29 U.S.C. § 158(d).

[15] The duty to bargain collectively, enforceable by the Board, "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

[16] Section 10(c), 29 U.S.C. § 160(c).

[17] The Fifth Circuit's recent decision in *Watkins* v. *United Steelworkers of America, Local No. 2369*, 516 F.2d 41 (5th Cir. 1975), *rev'ing* 369 F. Supp. 1221 (E.D. La. 1974), is consistent with Petitioners' position. In *Watkins*, the Court of Appeals reversed a holding that layoffs which adversely affect black employees of an employer that long ago refused to hire blacks are necessarily unlawful. The Court in *Watkins* limited its holding to certain facts presented there. In particular, it precluded a remedy only in the case of employees who had not been subjected to a prior system of discrimination and who were already in their "rightful place," 516 F.2d at 44-46. The facts and rationale of *Watkins* make it inapplicable to the instant case.

the facts to achieve a just remedy, *cf. Meadows* v. *Ford Motor Co.*, 510 F.2d 939, 949 (6th Cir. 1975), *petition for certiorari pending*, No. 74-1349. In this case, the propriety of retroactive seniority is manifest.

2.

Bowman's attempt to save the result below on the theory that it embodies a proper exercise of remedial discretion is unfounded in the record or in law.

Both the District Court and the Court of Appeals denied relief because they viewed retroactive seniority as being barred by a rule of law.[18] But the District Court, in a cryptic and unsupported comment, added that retroactive seniority was also denied "in the exercise of discretion," Pet. A.54. This unexplained assertion of "discretion," derived from an erroneous view of controlling legal principles,[19] has nothing in common with the purposeful equitable analysis required by *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d 280, 296 (1975).

Bowman's "discretion" argument ignores the cardinal principles, recently clarified by this Court, governing equitable discretion in Title VII cases, *Albemarle Paper Co.*

[18] See Pet. A.53-A.54; 495 F.2d at 417-18, Pet. A.30-A.31. Far from "allowing" any exercise of discretion by the District Court, the Fifth Circuit holding removes retroactive seniority from the array of equitable remedies available under Title VII.

[19] The District Court held retroactive seniority barred because, in its view, (1) only named plaintiffs who had filed EEOC charges could recover individual relief, and (2) Title VII's preference for conciliation precludes class-wide remedies. Those rules of law have been repudiated by the Fifth Circuit in this case, 495 F.2d at 422, Pet. A.37-A.39, and by this Court, *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d 280, 294-95 n.8 (1975). Yet Bowman still advances them as proper foundations for the District Court's purported exercise of discretion. Co. brief at 25-30.

v. *Moody, supra,* 45 L.Ed.2d at 296-298. Any attempt to justify denial of retroactive seniority in this case as "discretionary" would be incompatible with this Court's recognition that the fundamental Congressional purpose which district courts have discretion to achieve is to "make whole" the victims of discrimination; and that Title VII confides broad equitable powers to the district courts to "secur[e] complete justice," *Albemarle, supra,* 45 L.Ed.2d at 297.[20]

Finally, in light of its continuing bad-faith policies of discrimination,[21] Bowman may not even properly invoke the principles of equity to support its defense, *Albemarle, supra,* 45 L.Ed.2d at 299. Accordingly, the District Court could not make Bowman the beneficiary of equitable discretion.

3.

Whatever precise meaning this Court attributes to § 703 (h) of Title VII and its legislative history, no limitation on retroactive seniority thereby attaches to 42 U.S.C. § 1981. This Court's decision last term in *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454 (1975), pretermits any argument that purported limitations on Title VII relief can be engrafted onto the broad provisions of the earlier statute. In *Johnson* the Court held,

> that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent.

421 U.S. at 461. The Court observed that in some respects § 1981 offers more relief than Title VII, and in other respects less, see 421 U.S. at 458-61. Of particular pertinence

[20] The District Court gave no equitable reasons to support its exercise of "discretion," and there are none. *Cf.* Co. brief at 17-19.

[21] See Petitioners' brief at 6-10.

here, this Court reasoned in *Johnson* that despite Title VII's "range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief," 421 U.S. at 459. The Fifth Circuit, therefore, erred in failing to award relief under 42 U.S.C. § 1981.[22]

Respondents do not dispute the correctness of Petitioners' position on the § 1981 issue; rather they urge that the Court cannot reach it because they assert this issue was not squarely raised below. Both Franks' complaint and Lee's complaint specifically stated claims under § 1981 as a basis of jurisdiction and an alternative basis for all the relief sought (4a ff; 14a ff). The case was tried on this basis.[23] Because the Fifth Circuit's ruling *sua sponte* injected the § 703(h) bar issue into this case, the parties had neither briefed nor argued it below, nor had they specifically argued whether § 1981 provides an additional ground for relief.[24] Nonetheless, the § 1981 issue was clearly before the Fifth Circuit: Petitioners' brief on appeal specified that their complaints sought relief under 42 U.S.C. § 1981 as well as Title VII, see brief in Fifth Circuit, No. 72-3239 at 2-3.

[22] *Cf. Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 502 F.2d 1309, 1320 n.4, *pending on petition for certiorari,* No. 74-1064. The Fifth Circuit has now adopted a position on § 1981 relief "consistant [sic] with" that of *Waters. Watkins* v. *United Steelworkers of America, Local No. 2369,* 516 F.2d 41, 50 (5th Cir. 1975).

[23] The trial judge chose not to rule specifically on the § 1981 ground but denied the relief sought.

[24] The parties' arguments centered on whether retroactive seniority relief was appropriate in the case—an issue equally applicable to either Title VII or § 1981.

Petitioners squarely presented the retroactive seniority issue under 42 U.S.C. § 1981 in their Petition for a Writ of Certiorari, and Respondents did not then object to the grant of certiorari on that question. This Court, having issued the writ to review that properly presented question of law, which is of national significance, should not be deterred from deciding the question merely because the lower courts did not specifically address this question in their opinions.[25]

Respectfully submitted,

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[25] The decisions cited by Bowman (brief at 17) and USWA (brief at 33) are inapposite. The Court has refused to decide issues which were not presented by the pleadings, *McCullough* v. *Kammerer Corp.*, 323 U.S. 328 (1945); which were not assigned as error to the Court of Appeals (where required), *McCullough* v. *Kammerer Corp., supra; Duignon* v. *United States,* 274 U.S. 195, 200 (1927); where no appeal was taken from an adverse district court decision and where the Court of Appeals did not consider the issue, *Adickes* v. *S.H. Kress and Co.,* 398 U.S. 144, 147 n.2 (1970); or which were not raised in the petition for certiorari, *Zellerbach Paper Co.* v. *Helvering,* 293 U.S. 172, 182 (1934).